Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	
TSA Stores, Inc. (The Sports Authority)	CG Docket No. 02-278
Petition for Declaratory Ruling with Respect to Certain Provisions of the Florida Laws and Regulations	
In the Matter of	
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991	CG Docket No. 02-278

COMMENTS OF MBNA AMERICA BANK, N.A.

MBNA America Bank, N.A. ("MBNA") submits these Comments in support of the Petition for Declaratory Ruling[1] filed on February 1, 2005, by TSA Stores, Inc. ("TSA"). The TSA Petition asks the Commission to issue a declaratory ruling preempting Section 501.059 of the Florida Statutes as applied to interstate prerecorded voice telephone calls made to the residence of a person with whom the caller has an established business relationship ("EBR").

The TSA Petition is the most recent of the six petitions currently pending before the Commission as a result of the Commission's 2003 *Report and Order*,[2] which adopted a case-by-case narrow conflict preemption approach to state laws purporting to regulate interstate telemarketing. Given the states' continuing efforts to adopt new and ever-more-burdensome

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1 TSA Stores, Inc. (The Sports Authority) Petition for Declaratory Ruling, CG Docket No. 02-278 (Feb. 1, 2005) ("TSA Petition").

2 *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* 18 F.C.C. Rcd. 14014, (2003) ("*Report and Order*").

regulations that make no distinction between interstate and intrastate telemarketing, more petitions are surely on the way, with no real end in sight. Accordingly, while this petition – like the other five – is plainly preempted under the Commission's narrow conflict preemption approach, MBNA continues to believe that approach is fundamentally flawed.

As MBNA has explained in its comments on the previous petitions,[3] and only briefly reiterates here, Congress has conferred on the FCC exclusive regulatory jurisdiction over interstate telemarketing such that the states simply have no authority to regulate in that area. In these comments, MBNA emphasizes how the Commission's current approach has led not only to the stream of preemption petitions before this Commission, but also to fundamental confusion and errors in courts adjudicating state enforcement actions against interstate telemarketers. We again urge the Commission to adopt a straightforward jurisdictional approach to the regulation of interstate telemarketing. This will both give effect to Congress's intent and eliminate the significant practical problems now faced by telemarketers, the Commission, and the courts.

In its previous comments, MBNA explained the jurisdictional approach in detail.[4] In brief, Congress enacted the TCPA against a pre-existing allocation of federal and state jurisdiction in the Communications Act of 1934, according to which the Commission has exclusive jurisdiction over interstate communication while the states have exclusive jurisdiction over intrastate communication.[5] In the TCPA, Congress incorporated telemarketing within Title II of the Communications Act and, at the same time, amended section 2(b) of that Act to grant the Commission concurrent jurisdiction over *intrastate* telemarketing calls. But Congress took

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3 MBNA Comments In ATA Petition (Nov. 17, 2004); MBNA Reply Comments In ATA Petition (Dec. 2, 2004); MBNA Comments in CBA and NCMC Petitions (Feb. 2, 2005); MBNA Reply Comments in CBA and NCMC Petitions (Feb. 17, 2005).

4 *Id.*

5 *See* 47 U.S.C. § 152 (a) & (b).

no corresponding action to grant the states jurisdiction over *interstate calls* – jurisdiction that, pursuant to section 2(a) of the Communications Act, they have never possessed.

Because *Congress* has already determined that *only* the FCC may regulate interstate telemarketing, the states simply have no authority to do so, *regardless of whether their do-not-call laws purporting to regulate interstate telemarketing do or do not conflict with the federal rules*. The Commission's *OSPA* decision – holding that section 2(a)'s conferral on the Commission of "plenary and comprehensive" jurisdiction over interstate communications is "exclusive of state authority" and precludes state regulation of interstate operator services – confirms this conclusion.[6] Thus, as in its previous comments, MBNA urges the Commission to adhere to *OSPA*, assert its congressionally conferred exclusive jurisdiction over interstate telemarketing, and declare that states have no authority to regulate in this area.

In addition to being legally mandated, the jurisdictional approach will have real-world benefits for the Commission, the courts, and the telemarketing industry. As a practical matter, the Commission's failure to declare its exclusive jurisdiction over interstate telemarketing has led to a proliferation of state laws purporting to regulate interstate telemarketing, and the corresponding (and burgeoning) stream of conflict preemption petitions before this Commission. As explained in MBNA's prior comments, this barrage of petitions unfairly burdens telemarketers and unnecessarily squanders Commission resources. We reiterate here that replacing the legally unsound conflict approach with the congressionally mandated jurisdictional approach would avoid these problems altogether.

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[6] *In re Operator Services Providers of America*, 6 F.C.C. Rcd. 4475 (¶ 10) (1991) (*OSPA*). As *OSPA* explained, "[w]here Congress has given this Commission exclusive authority over interstate and foreign communications," the Commission need not demonstrate that state regulation of such communications conflict with federal law because states have no authority to regulate interstate communications in the first place. *Id.* ¶ 10 n.19.

In addition, the jurisdictional approach would eliminate another unintended negative consequence of the Commission's current approach – the confusion in the courts that has resulted from the Commission's failure to establish clearly its exclusive jurisdiction over interstate telemarketing. The Commission's reliance on case-by-case narrow conflict preemption has needlessly subjected telemarketers to substantial liability for actions the federal rules expressly allow, and has misled courts as to the proper jurisdictional allocation of regulatory authority.[7] Two recent court decisions illustrate the need for the Commission to adopt the jurisdictional approach to clear up such confusion: the U.S. District Court order[8] that corresponds to the instant TSA petition ("TSA Order"), and the recent North Dakota state court opinion and order[9] that corresponds to the ccAdvertising petition[10] seeking preemption of provisions of North Dakota's laws and regulations ("FreeEats Order").

Both cases involved enforcement of state do-not-call laws that ignore the critical distinction between *intrastate* and *interstate* calls. And both cases subjected interstate telemarketers to prosecution and fines *for calls plainly permissible under the federal rules.* Although the TSA Order primarily address removal issues not relevant here, in that case the State of Florida's Department of Agriculture and Consumer Services sought an injunction and civil penalties of up to $10,000 per violation against TSA for interstate calls made in full compliance with the federal do-not-call rules.[11] Similarly, in the North Dakota enforcement

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7 Far from a theoretical matter, states are vigorously enforcing their do-not-call laws, which are more restrictive than the federal rules, against interstate telemarketers. In addition to the two cases discussed in the text, a number of courts have awarded or entered judgments against telemarketers with no regard for the interstate versus intrastate distinction crucial to evaluating the legality of state telemarketing regulations. *See Exhibit A.*

8 *Florida v. The Sports Authority Florida, Inc.*, Order, No. 6:04-cv-115-Orl-JGG (M.D. Fla. June 4, 2004).

9 *North Dakota v. FreeEats.com, Inc.*, Opinion and Order, No. 04-C-1694 (N.D. Dist. Ct. Feb. 2, 2005).

10 *See* ccAdvertising Petition for Expedited Declaratory Ruling, CG Docket No. 02-278 (filed Sept. 13, 2004).

11 Specifically, Florida's Amended Complaint alleges that the TSA violated section 501.059 of the Florida Statute, which prohibits, with no established business relationship exception, sellers from making unsolicited

action, a state judge found that prerecorded interstate calls made by FreeEats.com in compliance with the federal rules violated the state's more restrictive prerecorded messages regulations.[12] FreeEats.com agreed to pay a $10,000 penalty as well as $10,000 in costs and attorneys fees. A brief analysis of these decisions demonstrates how the Commission's assertion of its exclusive jurisdiction over interstate telemarketing could have avoided these results in a manner fully consistent with congressional intent in enacting the TCPA.

In the TSA Order, the court made fundamental misinterpretations of specific provisions of the TCPA. Most seriously, the court misconstrued 227(e)(1), which provides that "nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive *intrastate* requirements or regulations on, or which prohibits" the use of certain telemarketing practices.[13] *Failing to draw any distinction between interstate and intrastate telemarketing*,[14] the court erroneously relied on section 227(e)(1) as evidence that the TCPA preserves state authority to regulate telemarketing, whether intrastate or interstate. The Commission no doubt contributed to that misreading by muddying the waters when it remarked that section 227(e)(1) was "ambiguous" as to interstate telemarketing calls, and, instead of

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prerecorded telephone calls – regardless of whether the calls are *interstate* or *intrastate* – to Floridians who are on the do-not-call list. *See* TSA Petition, Exhibit B, *Florida v. The Sports Authority Florida*, Amended Supplemental Complaint ¶¶ 7- 8, No. 03-CA 10535 (May 19, 2004). But TSA's Answer makes plain that all of the calls at issue were interstate calls made to Floridians with whom TSA had an established business relationship in compliance with 47 C.F.R. § 64.1200(a)(2)(iv). *See* TSA Petition, Exhibit D, *Florida v. The Sports Authority Florida*, Answer to Amended Complaint, Affirmative Defenses ¶¶ 2-5, No. 03-CA 10535 (May 19, 2004).

12 North Dakota alleged that non-commercial political polling calls made using automatic dialing and containing prerecorded messages by Virginia-based FreeEats.com violated N.D.C.C. § 51-28-02.

13 47 U.S.C. § 227(e)(1) (emphasis added).

14 Although the court acknowledged TSA's assertion that *interstate* calls were at issue, it deferred to the complaint, which was silent on the matter. That silence, however, simply reflects Florida's statute, which – like all of the state laws purporting to regulate interstate telemarketing – makes no distinction between interstate and intrastate calls.

resolving that ambiguity, relied on it to adopt the narrow conflict preemption approach.[15] But the TSA court's reading not only contradicts the plain language of section 227(e)(1), effectively reading the word "intrastate" out of the provision altogether, but also disregards the well-established allocation of authority between federal and state communications regulators.

The court could have easily avoided its erroneous conclusion by recognizing that Congress has conferred on the Commission exclusive jurisdiction over interstate telemarketing. As elucidated by the jurisdictional approach outlined above, section 227(e)(1) plainly reflects Congress's desire in 1991 to remain faithful to the basic design of the Communications Act. Specifically, the provision clarifies that notwithstanding the TCPA's enlargement of *federal* power over intrastate calls, the statute does not eliminate *state* authority over such intrastate calls. Like section 2(b)'s original reservation to the states of authority over *intrastate* communications, however, section 227(e)(1)'s clarification accords the states no authority whatsoever over *interstate* calls.

The TSA court was equally confused in its interpretation of section 227(f)(6), which provides that "[n]othing contained in this subsection shall be construed to prohibit an authorized State official from proceeding in State court on the basis of an alleged violation of any general civil or criminal statute of such state."[16] In a complete misreading, the court suggested that this provision preserves state-law actions enforcing do-not-call laws against telemarketers. But the plain language of section 227(f)(6) is unambiguous. It allows states to enforce criminal and civil laws of "*general*"[17] applicability (i.e., laws *not* directed at a particular communications activity or entity, such as state fraud laws) against in-state or out-of-state parties who violate them. But

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15 *Report and Order* ¶ 82.

16 47 U.S.C. § 227(f).

17 *Id.* (emphasis added).

nothing in the TCPA, let alone in section 227(f)(6), authorizes states to impose special burdens on interstate telemarketing. Indeed, as the jurisdictional approach makes plain, state imposition of additional restrictions on interstate telemarketers would substitute the state's legislative judgment for the command of Congress, which directed the Commission to exercise its exclusive authority to adopt a uniform regulatory regime for interstate telemarketing.

The Commission's failure to assert its exclusive jurisdiction over interstate telemarketing also caused confusion in the North Dakota state court's FreeEats Order. In that case, the court relied heavily (indeed almost to the exclusion of *any* independent analysis) on the Eighth Circuit's decision in *Van Bergen v. Minnesota*.[18] But both the FreeEats Order and *Van Bergen*, like the court in the TSA Order, completely ignore the distinction between interstate and intrastate calls.[19] But again, that distinction is crucial to understanding the relationship between federal and state do-not-call regulations.

The FreeEats Order, for example, points to Congress's decision not to enact a TCPA provision expressly preempting telemarketing regulation as evidence of its intent to preserve state authority, even with respect to interstate telemarketing. But against the backdrop of pre-existing law, that reading makes no sense. Indeed, because of the exclusive jurisdiction over interstate telecommunications *already* given to the Commission under section 2(a), a TCPA provision preempting interstate state regulations would have been completely unnecessary – again, the states never possessed the authority to regulate interstate communications in the first place.

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[18] 59 F.3d 1541 (8th Cir. 1995).

[19] Although *Van Bergen* involved an injunction and so was decided before any calls were made, that case concerned a gubernatorial candidate's efforts to use automatic dialing-announcing devices to reach in-state voters, *i.e.*, to make *intrastate* calls. By contrast, in the FreeEats case, all of the calls at issue were *interstate* calls. *See Petition for Expedited Declaratory Ruling*, cc Advertising Reply Comments at 9, CG Docket No. 02-278 (filed Nov. 17, 2004).

In sum, the rampant confusion in the courts regarding the TCPA and the scope of Commission jurisdiction over interstate telemarketing provides yet another reason for the Commission to clarify the *Report and Order* and to assert its exclusive jurisdiction over interstate telemarketing. By adopting the jurisdictional approach, the Commission can effectuate congressional intent, stem the never-ending tide of preemption proceedings, and provide much-needed guidance to the courts. Thus, MBNA urges the Commission to grant relief on the grounds raised in its previous comments and briefly summarized herein.

Respectfully submitted,

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EXHIBIT A

EXHIBIT A: JUDGMENTS ENTERED AGAINST INTERSTATE TELEMARKETERS IN STATE ENFORCEMENT ACTIONS

STATE	DEFENDANT	TYPE OF ACTION	PLAINTIFF/COURT	CASE NO.	PENALTY	DATE	NATURE OF COMPLAINT
FLORIDA	Vitana Financial Group, Inc, dba Direct Satellite (CA)	Judgment	Ag & Cons Svcs Comm. Charles Bronson/Orange County Circuit Court, Judge Donald E. Grincewicz	48-2004-CA-003414-O	$25,500	11/4/2004	Prohibited pre-recorded messages, calls to consumers on FL DNC list (Jan 03-Feb 04)
MISSOURI	Xentel (FL, DE, Canada)	Consent Order	AG Jay Nixon/ approved by Circuit Judge David Dowd		$75,000	5/28/2004	Calling consumers on state list, calling customers after company specific request made
NORTH CAROLINA	Warrior Custom Golf (CA)	Consent Judgment	AG Roy Cooper		$10,000	1/20/2004	Prohibited autodialer/pre-recorded message calls/calls to consumers on DNC list
NORTH CAROLINA	Consumer Credit Counseling Foundation (FL)	Consent judgment	AG Roy Cooper		$15,000	1/5/2004	Prohibited autodialer/pre-recorded message calls/calls to consumers on DNC list
NORTH DAKOTA	FreeEats (VA)	Judgment	ND Circuit Court/ South Central District, Judge Gail Hagerty	04-C-1649	$20,000	3/18/2005	Prohibited pre-recorded messages
NORTH DAKOTA	Platinum Credit Counseling (CA)	Judgment	ND Circuit Court/ South Central District, Judge Thomas Schneider		$13,000	2/24/2005	Did not give city, state, phone in pre-recorded message
OKLAHOMA	Satellite Solutions (TX)	Consent judgment	AG Drew Edmonson		$5,000	6/24/2004	No state registration, calls using autodialer, calls to consumers on OK DNC list
WISCONSIN	P&M Consulting (MO)	Consent judgment	AG Peg Lautenschlager/ Outagamie County Circuit Court, Judge Joseph Troy		$4,917	5/25/2004	Using pre-recorded messages, and calling residents on DNC list
WISCONSIN	Marktel II (MO)	Consent judgment	AG Peg Lautenschlager/ Outagamie County Circuit Ct, Judge Joseph Troy		$4,917	5/25/2004	Pre-recorded messages, and calls to consumers on DNC list
WISCONSIN	Soho Marketing (CA)	Judgment	AG Peg Lautenschlager/ Kenosha County Circuit Ct, Judge Michael Fisher		$86,000	3/18/2004	No state registration, using pre-recorded messages, calling residents on DNC list
WISCONSIN	Platinum Marketing, Inc (TN)	Judgment	AG Peg lautenschlager/ Dane County Circuit Ct, Judge Michael Nowakowski		$11,594.20	1/8/2004	No state registration, using pre-recorded messages, calling residents on DNC list